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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO ANTONIO MEJIA, Defendant and Appellant.	F056764 (Super. Ct. No. BF124552A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Laurie Wilmore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

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A jury convicted appellant Ernesto Antonio Mejia of purchasing a stolen vehicle, knowing it was stolen, and of driving without a valid license. In a separate hearing, the trial court found true that Mejia had served a prior prison term. Mejia raises numerous claims of prejudicial error: (1) discriminatory use of peremptory challenges;

(2) instructional error; and (3) prosecutorial misconduct. In addition, he asks this court to review personnel records of the police department to determine if all discoverable material was released by the trial court.

FACTUAL AND PROCEDURAL SUMMARY

On August 15, 2008, Rodney Frame lived in Bakersfield and was the owner of a 1985 Chevy S-10 Blazer. Frame had purchased the car for $200 from a coworker, Gary Johansen, in June 2008. Frame kept the "pink slip" he received from Johansen, a Department of Motor Vehicles (DMV) temporary registration, and insurance documents for the vehicle in the middle console of the Blazer. Frame had one key to the car, which was in the possession of his son. Frame had purchased the Blazer to have a vehicle for his son to use while learning to drive.

According to Frame, as of August 15, 2008, there was nothing wrong with the steering column in the Blazer and the car had front and rear license plates bearing the number 2TE291. Also, the car had a new stereo with an MP3 player connected to it that Frame had installed.

At approximately 10:55 a.m. on August 19, Bakersfield Police Officer William Wesbrook was in uniform and on patrol in a marked police car. Wesbrook saw a 1985 Chevy Blazer that had "a sticker in the rear window." He conducted a records check on the front license plate of the car, 2TE291, and discovered Frame had reported the car stolen. Wesbrook made a traffic stop of the Blazer. Mejia was driving and there was one passenger, Ivan Alvarenga, in the car.

When Wesbrook stopped the Blazer, it had no rear license plate and a temporary DMV sticker on the rear window. A bicycle and backpack belonging to Mejia were in the car. The stereo was missing from the dashboard. The steering column had been broken and a sock was wrapped around the column to keep the wiring inside the column. There was no key in the ignition; Wesbrook could not locate a key for the car; and Mejia stated he had no key to the ignition. The vehicle's paperwork located by Wesbrook in the

car indicated the car was registered to Frame; Mejia's name did not appear on any of the paperwork.

Wesbrook read Mejia his rights and Mejia waived his rights and agreed to speak with Wesbrook. Mejia told Wesbrook he bought the Blazer from "some pisa," a reference to an immigrant worker, three or four days earlier. Mejia declined to give the name of the person who supposedly sold him the Blazer. Mejia also told Wesbrook that he had a pink slip for the Blazer in his backpack. Wesbrook checked and could find no title or registration documents. Mejia did not have a bill of sale for the car.

Mejia was charged with violating Penal Code section 496d,[1] buying or receiving a stolen vehicle knowing the vehicle was stolen, and driving without a valid license. It also was alleged that he had served two prior prison terms and that he had a prior conviction for driving without a valid license. Mejia pled no contest to the charge of driving without a valid license and admitted the allegation that he had a prior conviction for the same offense in exchange for a promise that he would receive a term of no more than six months in jail, to be served concurrently to any time imposed for the stolen vehicle offense.

Jury selection began on November 12, 2008, for the trial on the stolen vehicle offense. The panel of prospective jurors consisted of 35 individuals -- 22 Caucasians, nine Hispanics, three African-Americans, and one Asian. The prosecutor used a peremptory challenge to remove a juror, after which the defense accepted the jury. The prosecutor used a peremptory challenge to remove a second juror and the defense accepted the jury. After the prosecutor used a third peremptory challenge to excuse a juror, defense counsel stated he had a "*Wheeler*[2] motion."

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

Outside the presence of the jurors, defense counsel argued that the prospective panel had included only three African-Americans. One had been excused because of a medical issue, and the prosecutor used her second and third peremptory challenges to excuse the other two. The prosecutor explained the reason for the use of her peremptory challenges.

The prosecutor chose to excuse one juror on a peremptory challenge because that juror's girlfriend currently was being prosecuted in Kern County for a DUI (driving while under the influence) and the juror expressed the opinion that the "D.A. … wanted to make an example out of her for some reason" and seemed to think the district attorney's office was treating his girlfriend unfairly. The prosecutor had tried to excuse this juror for cause, but the trial court denied the request, stating, however, it was "kind of close."

The prosecutor opined that she exercised a peremptory challenge to excuse the other African-American juror because that juror's questionnaire and responses to questions showed that the juror "[did] not want to judge another person" and might have trouble voting guilty. The prosecutor did not believe this juror could be "an impartial juror to the People." Defense counsel disagreed with this assessment.

The trial court noted that this particular juror had brought up her unwillingness to judge another person and then "hemmed and hawed" and said "maybe" when it was explained to her that jurors judged the facts, not the person. The trial court opined that this juror might have "a conflict in her mind" if the facts indicated guilt, but the juror might be unwilling to vote for guilt if the juror perceived that as judging a person. The trial court concluded the prosecutor had stated "a very good reason why she would exercise a peremptory challenge" as to this juror. The trial court denied the *Wheeler* motion.

At trial, Mejia's mother testified that she withdrew money from her bank account to give to her son because he was going to buy a car. Bank records substantiated a

withdrawal of $300 by Mejia's mother. The defense also presented evidence that a car buyer has 10 days from the date of purchase to report the sale to DMV.

The jury returned a verdict of guilty on the section 496d offense. The trial court found one of the two prior prison term enhancements to be true. It sentenced Mejia to the midterm of two years for the 496d offense, a consecutive term of one year for the prior prison term enhancement, and a concurrent 180-day term for the offense and enhancement to which Mejia pled no contest.

DISCUSSION

Mejia contends the trial court erred in denying his *Wheeler/Batson*[3] motion. He further contends the trial committed numerous errors in instructing the jury and the prosecutor committed misconduct. Finally, Mejia asks this court to review Wesbrook's sealed personnel records to determine whether the trial court disclosed all discoverable material.

I. *Wheeler/Batson* Motion

Mejia, who is Hispanic, contends the trial court erred prejudicially when it denied his *Wheeler/Batson* motion based upon the prosecutor's use of peremptory challenges to excuse two African-American jurors, who were the lone remaining African-American members of the venire panel.

Standard of review

The use of peremptory challenges to excuse prospective jurors based on race violates the federal and state Constitutions. (*Batson, supra*, 476 U.S. at p. 97; *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) "Such a use of peremptories by the prosecution 'violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. [Citations.] Such a practice also violates the defendant's right to equal protection under

[3] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*).

the Fourteenth Amendment to the United States Constitution.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 341 (*Bonilla*).) There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the opposing party bears the burden to demonstrate impermissible discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *Bonilla,* at p. 341.)

The defendant must first "make out a prima facie case 'by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.' [Citation.] Second, once the defendant has made out a prima facie case, the 'burden shifts to the State to explain adequately the racial exclusion' by offering permissible race-neutral justifications for the strikes. [Citations.] Third, '[i]f a race-neutral explanation is tendered, the trial court must then decide … whether the opponent of the strike has proved purposeful … discrimination.' [Citation.]" (*Johnson v. California* (2005) 545 U.S. 162, 168, fn. omitted.)

The three-step *Batson* analysis, however, does not require a trial court to apply it in a mechanistic fashion. Thus, a "trial court may invite the prosecutor to state race-neutral reasons for the challenged strikes *before* announcing its finding on whether a defendant met the first step of the *Batson* test by making out a prima facie case of discrimination. [Citation.]" (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 500-501 (*Adanandus*).) Indeed, "it is the better practice for the trial court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out. This may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established. [Citation.]" (*Bonilla, supra,* 41 Cal.4th at p. 343, fn. 13; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 723-724 (*Mayfield*) ["even where no prima facie case found, court may properly consider reasons actually given by the prosecutor"].)

A trial court's denial of a *Wheeler/Batson* motion is reviewed deferentially, considering only whether substantial evidence supports the ruling. (*Bonilla, supra,* 41 Cal.4th at p. 341.) """"If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.'"' [Citation.]" (*Adanandus, supra,* 157 Cal.App.4th at p. 501.)

Analysis

In support of his contention that the challenged jurors had been inappropriately subject to peremptory challenge, Mejia offered no argument or evidence to show a strong likelihood that the challenged jurors were subject to peremptory challenges simply because of race, other than the simple statement that both challenged jurors were African-American. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154.) Generally, more than a reference to the race of the challenged jurors is required to establish a prima facie case. (*Mayfield, supra,* 14 Cal.4th at p. 723.)

Here, the trial court did not expressly find that Mejia had established a prima facie case of discrimination, merely that "technically there is a possibility" that the peremptory challenges had been used for an inappropriate purpose. Where no finding of a prima facie case is made by the trial court, the reviewing court considers the entire record of voir dire, examining that record with considerable deference for evidence that would support the trial court's ruling. (*Mayfield, supra,* 14 Cal.4th at p. 723.)

After the trial court asked the prosecutor to explain her reasons for exercising peremptory challenges to discharge the two questioned jurors, the prosecutor offered race-neutral reasons. (*People v. Lewis* (2008) 43 Cal.4th 415, 471 (*Lewis*).) As to one juror, that juror had stated in voir dire that his girlfriend currently was being prosecuted by the district attorney's office in Kern County and he felt she was being unfairly singled out. The prosecutor noted that the second juror had stated a reluctance to judge other people, which the prosecutor felt indicated a reluctance to return a guilty verdict,

regardless of the evidence. The prosecutor felt this juror could not be impartial to the People.

The trial court found that the prosecutor had stated race-neutral reasons for exercising her peremptory challenges as to these jurors and denied the *Wheeler/Batson* motion. The trial court clearly assessed the credibility of the proffered explanations from the prosecutor, even noting that, as to the second juror, the juror herself "brought up" her unwillingness to judge another person and had "hemmed and hawed" and said "maybe" when pressed about judging the facts and not the person. The prosecutor's reasons are supported by the record and are not implausible. (*Lewis, supra,* 43 Cal.4th at p. 471.)

The record discloses additional race-neutral reasons why the second juror should be subject to a peremptory challenge. That juror testified during voir dire that her nephew currently was being prosecuted in Kern County for "shooting somebody." Although the prosecutor may not have listed this as a reason for exercising a peremptory challenge when asked, a reviewing court may use additional grounds disclosed by the record that support the trial court's ruling on a *Wheeler/Batson* motion. (*People v. Panah* (2005) 35 Cal.4th 395, 439.)

Both challenged jurors had ties to people who currently were being prosecuted by the same office prosecuting Mejia, which could cause the prosecutor to retain some doubt about their ability to serve as unbiased and impartial jurors. (*People v. Turner* (1994) 8 Cal.4th 137, 165 [prosecutor may act on a hunch or apparently arbitrarily, as long as the peremptory challenge is not based on group bias].) Even if both jurors indicated they could set aside any concern about those prosecutions and act as a neutral and impartial juror in Mejia's case, these connections alone serve as a valid race-neutral reason for excusing these prospective jurors on a peremptory challenge. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124.)

Reviewing the trial court's ruling deferentially, as we must, we conclude there was substantial evidence supporting the trial court's finding that the prosecutor had race-

neutral reasons for excluding the two challenged jurors and consequently denying the *Wheeler/Batson* motion. We conclude, therefore, that the trial court did not err in denying the motion.

II. Claims of Instructional Error

Mejia raises five separate claims of instructional error: (1) failure to instruct on mistake of fact as requested; (2) failure to instruct on claim-of-right defense sua sponte; (3) failure to instruct on the burden of proof on defenses; (4) failure to instruct on the meaning of "stolen" property sua sponte; and (5) failure to instruct on the requisite mental state for possession of stolen property.

Mistake of fact

Mejia contends receipt of stolen property is a specific intent crime; consequently, he asserts mistake of fact is a defense to the crime because he believed he had lawfully purchased the vehicle. He argues the trial court erred prejudicially in refusing to instruct on mistake of fact. Mejia's contention fails for three reasons.

First, Mejia's premise is flawed because receipt of stolen property is *not* a specific intent crime. Although Mejia contends that *People v. Reyes* (1997) 52 Cal.App.4th 975 (*Reyes*) stands for the proposition that receipt of stolen property is a specific intent crime, he misstates the holding of the case. *Reyes* reiterated that receipt of stolen property is a general intent crime, albeit one that has as one of its elements a knowledge requirement, i.e., knowledge that an item is stolen. (*Id.* at pp. 983-984.) The trial court here instructed the jury on the need to find that Mejia had the specific mental state of knowledge in order to convict him.

Second, although a defendant has a right to instructions that address defense theories, a trial court must give only those instructions that are supported by substantial evidence. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386 (*Ponce*).) Substantial evidence does not support a mistake-of-fact instruction. Mejia had no key for the vehicle; the steering column obviously had been tampered with and had a sock wrapped

around it to keep wires from falling out; the rear license plate was missing; and there was a hole in the dash where the stereo had been removed. Mejia's claim to have purchased the car with money loaned him by his mother was belied by Mejia, claiming he purchased the car three or four days before his arrest, but his mother testifying she loaned him money only the day before his arrest.

Third, any failure to instruct on mistake of fact was not prejudicial. Even if the jury had been instructed on mistake of fact, it is not reasonably probable the jury would have reached a different verdict. (*People v. Flood* (1998) 18 Cal.4th 470, 489-490 (*Flood*).) The prosecution was required to prove beyond a reasonable doubt that (1) the Blazer was stolen; (2) Mejia knew the Blazer was stolen; and (3) Mejia had possession of the Blazer. (*People v. Land* (1994) 30 Cal.App.4th 220, 223-224 (*Land*).) The jury was instructed that it had to find each of these elements and specifically that Mejia "actually knew the automobile was stolen or obtained by theft." In deciding this factual issue, the jury had before it evidence of Mejia's claim that he purchased the vehicle with money obtained from his mother. The jury necessarily resolved this factual issue against Mejia when it found him guilty of receipt of stolen property, a verdict that required the jury to find beyond a reasonable doubt that Mejia had knowledge that the Blazer was stolen.

Claim of right

Mejia contends the trial court had a sua sponte duty to instruct the jury on a claim-of-right defense. He is mistaken for the same reasons we articulated in our discussion of mistake of fact.

A claim-of-right defense applies when a defendant has a bona fide but mistaken belief that he or she has a right to the property. Such a bona fide belief negates felonious intent. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1142-1143; *People v. Romo* (1990) 220 Cal.App.3d 514, 519.) The trial court, however, has a sua sponte duty to instruct only on defenses for which there is substantial evidence. (*Ponce, supra*, 44 Cal.App.4th at p. 1386.)

Here, the record evidence, described above, did not support a claim-of-right defense. Also, Mejia did not know the name of the person who sold him the car, referring to the unknown seller as "some pisa." Mejia had no pink slip showing any chain of title from the "pisa" who purportedly sold him the car; the name on the pink slip was Frame's; and Mejia never claimed to have purchased the car from Frame.

Again, if it was error to fail to instruct sua sponte on claim of right, any error was not prejudicial. Even if the jury had been instructed on mistake of fact, it is not reasonably probable the jury would have reached a different verdict. (*Flood, supra,* 18 Cal.4th at pp. 489-490.)

As we noted above in our discussion of mistake of fact, the jury was instructed that it had to find that Mejia "actually knew the automobile was stolen or obtained by theft." In deciding this factual issue, the jury had before it all the evidence we have described, including Mejia's claim that he purchased the vehicle with money obtained from his mother. The jury necessarily resolved this factual issue against Mejia when it found him guilty of receipt of stolen property, a verdict that required the jury to find beyond a reasonable doubt that Mejia had knowledge that the Blazer was stolen.

Burden of proof

Mejia contends the trial court erred prejudicially when it failed to instruct the jury sua sponte on the burden of proof for the mistake-of-fact and claim-of-right defenses. Because we concluded the trial court had no sua sponte duty to instruct on these defenses and, alternatively, any error was not prejudicial, it follows that the trial court had no duty to instruct on the burden of proof for these offenses and any error in this regard was not prejudicial.

Meaning of "stolen"

Mejia also claims the trial court had a sua sponte duty to instruct the jury on the meaning of the term "stolen property" and property obtained by "theft." He is mistaken.

Mejia relies on *People v. MacArthur* (2006) 142 Cal.App.4th 275 to support his contention. *MacArthur*, however, is factually distinguishable. In *MacArthur*, the defendant pawned jewelry given to him by his girlfriend. She often had given him jewelry belonging to her mother to pawn and had specified that the items should be pawned for a low amount so they would be easy to redeem. (*Id.* at pp. 277-278.) The appellate court noted that "pawning property does not transfer ownership or necessarily deprive the owner of possession permanently." (*Id.* at p. 281.) Under these particular circumstances, the appellate court held that a jury should be instructed on the definition of the terms "stolen" and "obtained by theft." (*Id.* at pp. 280-281.)

Here, there was no evidence that Mejia did not intend to deprive Frame permanently of ownership and possession of the Blazer. On the contrary, Mejia told Wesbrook that he had purchased the vehicle and had a pink slip establishing ownership. Clearly, if Mejia claimed ownership, he was asserting a claim to permanent possession that was intended to deprive anyone else of ownership. Thus, the evidence did not present a factual scenario giving rise to a sua sponte duty to define "stolen" or "obtained by theft."

Mental state instruction

Finally, relying upon *Reyes*, *supra*, 52 Cal.App.4th 975, Mejia argues the trial court was required to instruct the jury that receipt of stolen property required a specific intent. Once again, Mejia is mistaken. The cases cited by Mejia do not support his contention and the jury received adequate instructions on the requisite mental state.

As we noted previously in our analysis of Mejia's instructional claim pertaining to mistake of fact, Mejia misstates the holding of *Reyes* and fails to distinguish between specific intent and a knowledge requirement. *Reyes* does not stand for the proposition that receipt of stolen property is a specific intent crime. *Reyes* reiterated that receipt of stolen property is a general intent crime, albeit one that has as one of its elements a

knowledge requirement, i.e., knowledge that an item is stolen. (*Reyes, supra*, 52 Cal.App.4th at pp. 983-984.)

The case of *People v. Jeffers* (1996) 41 Cal.App.4th 917 also does not support Mejia's contention. In *Jeffers*, the defendant was charged with being a felon in possession of a firearm, a general intent crime. The trial court failed to instruct on general intent and also erred in refusing a pinpoint instruction on the requisite mental state, i.e., the knowledge requirement that what the defendant possessed was a firearm. (*Id.* at pp. 922-924.) The trial court here did not make those mistakes.

In assessing whether the jury instructions were erroneous, we consider them as a whole and assume the jurors were capable of understanding them. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) We also presume the jury understood and followed the trial court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Cain* (1995) 10 Cal.4th 1, 52.) Here, the jury was instructed with CALJIC No. 3.31.5 that Mejia had to have a certain mental state, and CALJIC No. 14.65 (receiving stolen property—defined) identified the mental state. That CALJIC No. 14.65 does not use the term "mental state" is of no consequence.

III. Prosecutorial Misconduct

Mejia contends the prosecutor committed misconduct in three distinct ways by (1) misstating the law, (2) commenting on Mejia's failure to testify, and (3) personally vouching for herself and a witness.

First, Mejia contends the prosecutor's statement, "If he's got a defense and he wants you to believe it, he better show you some proof. You want us to believe that there's a pink slip, bring it in," improperly shifts the burden of proof to the defense and thereby misstates the law.

Second, Mejia contends the prosecutor's use of the verb "say" constitutes a comment on his failure to testify. Specifically, when the prosecutor wondered why Mejia

never said "say, 'Look, I've got the pink slip. Here it is,'" and when the prosecutor commented that Mejia had not identified the purported seller by name.

Third, Mejia contends that the prosecutor improperly vouched for herself and Wesbrook when she accused defense counsel of calling Wesbrook a liar and insinuating Mejia's pink slip was destroyed and then asserted that scenario did not occur:

> "[L]et's burn this pink slip or hide it so the Defense can't find it. Some big conspiracy against Mr. Mejia, that is not reasonable. Officer Wesbrook did not do that. The D.A.'s office did not do that."

Mejia's argument fails because the comments did not amount to prosecutorial misconduct. Because we address the merits of the contentions, we decline to address the People's contention that the claim of prosecutorial misconduct is waived.

Analysis

When the issue of prosecutorial misconduct focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*).) Whether a prosecutor is guilty of misconduct must be determined in light of the particular factual situation in each case. (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182.) A prosecutor is given wide latitude during closing argument. The argument may be vigorous, as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom. (*People v. Wharton* (1991) 53 Cal.3d 522, 567 (*Wharton*).) A prosecutor may vigorously argue his or her case and may use appropriate epithets. (*People v. Harrison* (2005) 35 Cal.4th 208, 244.)

The California Supreme Court restated the established grounds for a finding of prosecutorial misconduct in *People v. Samayoa* (1997) 15 Cal.4th 795, 841. In general, a prosecutor's intemperate behavior must comprise a pattern of such egregious conduct that renders the trial unfair, and therefore makes the conviction a denial of due process. If the

prosecutor's conduct does not render the criminal trial fundamentally unfair, his or her actions will be regarded as prosecutorial misconduct only if he or she uses '"'"'deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"'" [Citation.]" (*Ibid.*)

Failure to Testify

With respect to the prosecutor's comments regarding Mejia's failure to produce a pink slip, there is no reasonable likelihood the jury understood the comments as commenting on Mejia's failure to testify. (*Clair, supra,* 2 Cal.4th at p. 663.) After waiving his rights and agreeing to speak, Mejia told Wesbrook he had a pink slip in his backpack showing he owned the Blazer. Wesbrook was unable to locate it and Mejia refused to name the person from whom he supposedly bought the Blazer.

Mejia's comments during this exchange were not privileged; he had been advised of his rights and waived them. Having affirmatively stated that he (Mejia) purchased the vehicle and had a pink slip showing ownership, it was fair comment on the evidence for the prosecutor to note Mejia's failure to produce the pink slip or identify the seller when talking with Wesbrook. (*Clair, supra,* 2 Cal.4th at p. 663.) The prosecutor's comments did not constitute improper comment on Mejia's failure to testify at trial.

Shifting burden of proof

The prosecutor's comments did not shift the burden of proof to Mejia. There is a difference between the burden of producing some evidence to support a defense and the burden of proof for a conviction. The defendant does have the burden of producing some evidence to support his or her theory of defense. (*People v. Babbitt* (1988) 45 Cal.3d 660, 694.) Unless there is some evidence to support the theory of defense, the trial court has no obligation to instruct on the theory. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) The prosecutor is allowed to comment on and make vigorous argument regarding the evidence, or lack thereof, in the case. (*Wharton, supra,* 53 Cal.3d at p. 567.)

Vouching

Mejia's last argument, the prosecutor improperly was vouching for a witness, also fails. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971 (*Frye*).)

Here, defense counsel suggested in closing argument that Wesbrook might not have located the pink slip Mejia claimed was in his backpack because Wesbrook was forgetful, lazy, or less than thorough in his investigation. Defense counsel also suggested that Wesbrook may have fabricated the testimony that Mejia claimed to have purchased the Blazer three or four days before being arrested.

The prosecutor responded to these insinuations in defense counsel's closing argument by pointing out that there simply was no apparent reason for either Wesbrook or the district attorney's office to engage in the actions defense counsel insinuated. A prosecutor may make "assurances regarding the apparent honesty or reliability of " a witness "based on the 'facts of [the] record and the inferences reasonably drawn therefrom,'" which is what the prosecutor did in Mejia's case. (*Frye, supra*, 18 Cal.4th at p. 971.) The prosecutor did not refer to any evidence outside the record in order to bolster Wesbrook's credibility and made acceptable comments in rebuttal about Wesbrook and the district attorney's office in response to defense insinuations. (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1313.)

IV. *Pitchess*[4] Motion

Mejia filed a *Pitchess* motion asking for disclosure of Wesbrook's personnel file for any information regarding official misconduct, dishonesty, falsifying police reports, falsifying information, lying under oath, fabrication of probable cause, coercion of a statement from an accused, or any acts of retribution against someone who files a

[4] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

citizen's complaint. The prosecution opposed the motion. The trial court granted the motion "regarding issues of dishonesty" and conducted an in camera hearing.

Mejia asks this court to review the personnel file to be sure all material requested in his *Pitchess* motion was disclosed; the People do not object.

The trial court has broad discretion in ruling on both the good cause and disclosure components of a *Pitchess* motion, and its ruling will not be disturbed absent an abuse of that discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086.)

We have reviewed the personnel file and conclude the trial court did not abuse its discretion.

DISPOSITION

The judgment is affirmed.

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CORNELL, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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GOMES, J.